(2)

No. 90-1048

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

ALEXANDER MALICK,
Petitioner,

vs.

SANDIA CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Should this Court review the constitutionality of the summary judgment procedure under the Seventh Amendment, where that issue was not raised in the underlying action (dismissed on summary judgment), and where the current action is barred by res judicata? [1]

[1] The parties are set forth in the title; respondent Sandia Corporation is a wholly-owned subsidiary of American Telephone & Telegraph Company ("AT&T"). The United States Department of Energy ("DOE") owns the facilities and all the assets of Sandia National Laboratories; pursuant to a prime contract between AT&T and the United States of America, Sandia Corporation (on behalf of DOE) operates said facilities as a no-fee, no profit contractor, and DOE assumes all costs and risks of such operations, including litigation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PROCEDURAL HISTORY AND CONTENTS OF APPENDIX

The following is an outline of the procedural history of this action and the related case which preceded it. All relevant orders are provided separately as the appendices to this opposition brief.

Malick I

1. *District Court*: Malick filed his original diversity action (N.D. Ca. Case No. C-83-4836) in October 1983. Summary judgment for Sandia initially was denied by Judge Schnacke but was granted on reconsideration in May 1985. Appendix A.

2. *District Court*: Malick's motion to alter or amend judgment was denied. Appendix B.

3. *Ninth Circuit*: Malick appealed to the Court of Appeals for the Ninth Circuit (Appellate Case No. 85-2299), which affirmed. Appendix C.

4. *Ninth Circuit*: Malick petitioned for rehearing. The Ninth Circuit denied the motion and amended its order. Appendix D.

5. *United States Supreme Court*: Malick filed a petition for writ of certiorari (Supreme Court Case No. 86-1293), which was denied. 480 U.S. 935 (1987). Appendix E.

6. *United States Supreme Court*: Malick petitioned for rehearing, and was denied. 481 U.S. 935 (1987). Appendix F.

7. *Ninth Circuit*: Malick filed a motion to recall mandate and to reconsider and set aside the order granting summary judgment on the theory of judicial error pursuant to Rule 60(b)(1). The Ninth Circuit denied this motion on September 4, 1987. Appendix G.

Malick II

1. *District Court*: Malick filed a subsequent independent action in equity to vacate summary judgment (on a theory of "extrinsic mistake" in *Malick I*) in July 1989. The complaint was dismissed by Judge Schwarzer on October 31, 1989, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, on res judicata grounds, warning Malick of the potential for sanctions in the future. Appendix H.

9. *Ninth Circuit*: Malick appealed. The Court of Appeals affirmed on res judicata grounds, and noted that the constitutionality of the summary judgment procedure is well-established. Sanctions were awarded. Appendix I.

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RESPONDENT'S BRIEF IN OPPOSITION

REASONS FOR NOT GRANTING CERTIORARI

The matters raised by Petitioner Alexander Malick ("Malick") are barred on the merits by the related doctrines of res judicata and law of the case; those doctrines provide a sufficient basis for rejecting the petition. The Court need not reach the abstract constitutional issue asserted which, in any event, is a long-settled question of law.

Malick I: Four years ago, in *Malick v. Sandia Corporation*, No. 86-1293 ("*Malick I*"), this Court denied a

petition for certiorari concerning the same summary judgment objected to in the current action. Rehearing also was denied. Malick returned to the Court of Appeals for the Ninth Circuit, seeking a recall of mandate, and was denied. Malick was not deterred.

Malick II: Almost two years after the last ruling in *Malick I*, Malick returned to the district court and revived the same contentions, styling the current action as an "independent action in equity to vacate summary judgment", in an attempt to distinguish it from *Malick I*. There is nothing "independent" about *Malick II*, however; the only difference is that the abstract constitutional challenge to summary judgment was added. Both the district court and the Ninth Circuit held that *Malick II* is barred by res judicata, in that it concerns precisely the same facts, parties and issues as are involved as in the underlying case. The Ninth Circuit observed:

> A judgment in a previous suit is conclusive in a second suit between the same parties or their privies on the same cause of action.

Appendix I at p. 23a, *quoting*, *American Triticale, Inc. v. Nytco Serv., Inc.*, 664 F. 2d 1136, 1146-47 (9th Cir. 1981) and *citing*, *Montana v. United States*, 440 U.S. 147, 153 (1979).

Sanctions have been imposed against Malick for continuing to pursue an action "wholly without merit."[1] Nevertheless, after over seven years of litigation, and several passes up and down the federal court system (including this Court's denial of certiorari and denial of rehearing), Malick continues to occupy the courts' time complaining of the summary judgment which should have

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[1] Judge Schwarzer, for the Northern District of California, warned Malick that any further pursuit of his claim would warrant sanctions. The Ninth Circuit subsequently observed that Malick had been warned, and imposed sanctions for his frivolous appeal.

ended this matter long ago.[2] He now asks this Court to consider whether summary judgment *ever* can be granted, under any circumstances, as a matter of constitutional law.

Malick's petition is brought solely on the abstract question whether summary judgment procedure (Rule 56, Federal Rules of Civil Procedure) intrinsically violates the right to a jury trial under the Seventh Amendment of the United States Constitution. The summary judgment procedure has a long and well-established history within the federal judicial system; for that reason, "it is not surprising that there have been few cases under Rule 56 that have questioned its constitutionality." 10 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* Civil 2d § 2714 (1983) (reviewing historical use of the procedure). The constitutional right to a jury trial arises only when there exists an issue of fact for the jury to decide; summary judgment determines whether there is such an issue. See Appendix I at p. 23a-24a (citing cases).

This Court has closely examined the standard on which a summary judgment may be based, implicitly recognizing the propriety of the summary judgment procedure. *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). As this Court noted in *Celotex Corp. v. Catrett, supra*:

> Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action."

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[2] The procedural history described in Malick's current petition is essentially correct, but incomplete. See Procedural History and Contents of Appendix, *infra*, and the appendices (which reflect the courts' decisions at each juncture).

477 U.S. at 327 (*quoting* Fed. R. Civ. Proc. 1).[3]

Malick asserts that Rule 56 is unconstitutional because the precise procedure now used was not employed at common law. The Supreme Court rejected a similar argument in *Parklane Hosiery Co. Inc. v. Shore*, 439 U.S. 322 (1979), observing:

> The Seventh Amendment has never been interpreted in the rigid manner advocated by the petitioners. On the contrary, many procedural devices developed since 1791 that have diminished the civil jury's historic domain have been found not to be inconsistent with the Seventh amendment. See, . . . *Fidelity & Deposit Co. v. United States*, 187 U.S. 315, 319-321 [(1902)] (*summary judgment does not violate the Seventh Amendment*).

439 U.S. at 335 (emphasis added; citations omitted concerning directed verdict and retrial procedures).[4]

Malick's request that the Court reexamine the legitimacy of this long-established procedure is a transparent effort to reopen his case once again, now that nearly every other procedure has been employed to prolong this litigation.

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[3] By now the Court's longstanding endorsement of the Federal Rules should obviate the need to consider Malick's implication that the rules are the work of a devious cabal of judges and lawyers bent on depriving litigants of their common law rights.

[4] Chief Justice (then Justice) Rehnquist came to the same conclusion in his dissent in *Parklane Hosiery*, distinguishnig summary judgment from the procedure in issue (offensive collateral estoppel):

> The procedural devices of summary judgment and directed verdict are direct descendants of their common-law antecedents. They accomplish nothing more than could have been done at common law . . .

439 U.S. at 349-350 (footnote omitted).

CONCLUSION

Sandia respectfully requests that the Court not only deny Malick's petition for a writ of certiorari, but also remand this case with directions to the courts below to employ an effective means to end this seemingly interminable and very costly process.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

C-83-4836 RHS

ALEXANDER MALICK,
Plaintiff,

vs.

SANDIA CORPORATION,
Defendant.

ORDER

[Filed May 3, 1985]

On August 9, 1984, this Court issued an order denying defendant Sandia's summary judgment motion. On February 15, 1985, this Court: (a) held a hearing on Sandia's motion for reconsideration of the August 9, 1984 order; and (b) took under submission the motion for reconsideration. In the period since the February 15, 1985 hearing, each party has filed supplemental papers in connection with the motion for reconsideration.

In this civil action, plaintiff Malick seeks benefits under Sandia's employee benefit plans. It is undisputed that from 1971 to 1983: (a) Malick performed for Sandia engineering services, under a series of procurement contracts; (b) Malick was paid for those services on an hourly basis and never was paid an annual salary; and (c) Sandia did not concede it was covering Malick under its employee benefit plans.

Indeed, Sandia contends that Malick was an independent contractor, rather than an employee. And regardless

of Malick's status, the Employee Retirement Income Security Act (ERISA) did not require Sandia to cover Malick under any of its employee benefit plans [see 29 U.S.C. § 1052]. However, for purposes of the present order, this Court will assume that Malick was an employee of some sort.

The issue then becomes whether Sandia's employee benefit plans contain language which makes Malick eligible to participate in the plans. In 1980 Sandia restated its 1975 plan and split it into the Retirement Income Plan (hereinafter, "RIP") and the Pension Security Plan (hereinafter, "PSP").

The relevant portion of the 1975 plan defines: (a) "participants" as "employees on roll after June 30, 1975 and prior to July 1, 1974, who were not participants in the 1967 plan"; and (b) "employees" as "those persons who receive regular and stated compensation from the company other than a pension or retainer." However, while Malick was not a 1967-plan participant, it is undisputed that Sandia never classified Malick as a regular employee. And Sandia has presented evidence that Malick was not an "on roll employee," while Malick has presented no evidence to the contrary.

Thus, Malick was not covered under the 1975 plan. Nor was Malick covered under RIP, which applies only to salaried employees, whereas in the joint pretrial statement Malick admitted he was paid an hourly fee and not an annual salary. Of course, PSP can apply to a non-salaried employee. But whether or not Malick's loaded rate is considered, his hourly pay does not come within PSP's Pension Band Conversion Table, so that Malick was outside PSP's coverage.

In view of the inapplicability of Sandia's employee benefit plans to Malick, Malick lacks a meritorious breach-of-contract claim. All of Malick's other claims are based on the proposition that Sandia should have informed him

of his eligibility for employee benefits. However, because there was no such eligibility, these other claims also are unmeritorious.

Thus, this Court hereby: (a) grants the motion for reconsideration; (b) awards summary judgment in Sandia's favor; and (c) dismisses the complaint and this action.

Dated: May 1, 1985

/s/ Robert H. Schnacke
ROBERT H. SCHNACKE
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

C-83-4836 RHS

ALEXANDER MALICK,
Plaintiff,

vs.

SANDIA CORPORATION,
Defendant.

JUDGMENT

[Filed May 3, 1985]

In accordance with the accompanying order, it is hereby adjudged that the complaint and this civil action are dismissed. Defendant Sandia is entitled to an award of costs.

Dated: May 1, 1985

/s/ Robert H. Schnacke
ROBERT H. SCHNACKE
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-83-4836 R.H.S.

ALEXANDER MALICK,

Plaintiff,

vs.

SANDIA CORPORATION,

Defendant.

ORDER

[Filed Jun. 18, 1985]

The motion of plaintiff Alexander Malick to alter or amend the judgment filed herein on May 3, 1985 having come on for hearing on June 14, 1985; the parties having appeared through their respective counsel; the Court having considered the papers filed in support and in opposition to the motion, having heard oral argument and being fully advised in the premises:

It is hereby *ORDERED* that plaintiff's motion to alter or amend the judgment is in all respects denied.

Dated: 19 June, 1985

/s/ Robert H. Schnacke
ROBERT H. SCHNACKE
Judge of the United States
District Court

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-2299

D.C. No. CV-38-4836 RHS

ALEXANDER MALICK,
Plaintiff-Appellant,

vs.

SANDIA CORPORATION,
Defendant-Appellee.

MEMORANDUM *

[Filed Sep. 5, 1986]

Appeal from the United States District Court
for the Northern District of California
District Judge Robert H. Schnacke, Presiding

[Submitted August 13, 1986 **—San Francisco]

Before: WRIGHT and FARRIS, Circuit Judges, and RHOADES,*** District Judge

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

** Oral argument waived by appellant.

*** Of the Southern District of California.

We are asked to decide whether Malick, an independent contractor, is entitled to benefits under Sandia's ERISA employee benefit plans. The district court granted summary judgment for Sandia and we affirm.

Malick is a professional engineer who worked for Sandia Corp. from 1971 to 1983 under a series of 17 contracts whose duration ranged from six months to five years. Each agreement designated Malick an independent contractor. When he was twice offered an opportunity to be an employee, he rejected the suggestion, saying that he preferred the independence of his contractual relationship.

At Sandia's request, Malick became incorporated in 1977 and thereafter his corporation contracted his services to Sandia. Sandia did not withhold federal income taxes from payments to Malick or his corporation. The agreement between the parties provided that Malick's hourly rate constituted full payment for his professional services. There was no provision for employee benefits.

A new five-year contract in July 1982 called for annual pay rate negotiations. Later that year Malick considered the possibility that he might be a Sandia employee and eligible for some benefits. When he made a demand for them, Sandia asked him to sign a waiver of benefits and reaffirm his independent contractor status and ineligibility for benefits. He refused and his contract was not renewed.

Malick brought suit in October 1983. In December, Sandia told him it would treat the complaint as a claim for benefits. In the following month, Sandia's Employee Benefit Committee found Malick ineligible for benefits and told him he could appeal to the Claim Review Committee within 60 days. He did not do so.

De novo review is our usual standard in summary judgment cases. Eligibility decisions by ERISA trustees are entitled to considerable deference and will not be

reversed absent arbitrary, capricious, or bad faith action or a result unsupported by substantial evidence or erroneous on a question of law. *Moore v. Provident Life and Accident Ins. Co.*, 786 F.2d 922, 927 (9th Cir. 1986).

We decline to debate the question whether federal or state law applies to Malick's claims for benefits and damages. If those were properly dismissed, we need not say which law applies. Nor shall we take the route of remanding for dismissal for failure to exhaust administrative appeals from the committee action.

Summary judgment was proper. There were no factual questions. The committee of trustees did not act arbitrarily or capriciously. The evidence to support the conclusion was not only substantial. It was overwhelming.

AFFIRMED.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-2299

D.C. No. CV-38-4836 RHS

ALEXANDER MALICK,
Plaintiff-Appellant,

vs.

SANDIA CORPORATION,
Defendant-Appellee.

ORDER

[Filed Nov. 13, 1986]

Before: WRIGHT and FARRIS, Circuit Judges, and RHOADES,* District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judge Farris has voted to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for a en banc hearing, and no judge of the court has requested a vote of it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

The Memorandum disposition filed on September 5, 1986, is amended as follows:

Page 1, line 14: The opening sentence is changed to read:

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* Of the Southern District of California.

> We are asked to decide whether Malick is entitled to benefits under Sandia's ERISA employee benefit plans.

Page 3, lines 3-4: Delete the sentence, "If those were properly dismissed, we need not say which law applies," and replace with:

> His claims were properly dismissed. Malick was not entitled to relief under either federal or state law.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-2299

D.C. No. CV-38-4836 RHS

ALEXANDER MALICK,
Plaintiff-Appellant,

vs.

SANDIA CORP.,
Defendant-Appellee.

AMENDED MEMORANDUM *

[Filed Nov. 13, 1986]

Appeal from the United States District Court
for the Northern District of California
District Judge Robert H. Schnacke, Presiding

[Submitted August 13, 1986 **—San Francisco]
Decided September 5, 1986

Before: WRIGHT and FARRIS, Circuit Judges, and RHOADES,*** District Judge

We are asked to decide whether Malick is entitled to benefits under Sandia's ERISA employee benefit plans. The district court granted summary judgment for Sandia and we affirm.

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A new five-year contract in July 1982 called for annual pay rate negotiations. Later that year Malick considered the possibility that he might be a Sandia employee and eligible for some benefits. When he made a demand for them, Sandia asked him to sign a waiver of benefits and reaffirm his independent contractor status and ineligibility for benefits. He refused and his contract was not renewed.

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De novo review is our usual standard in summary judgment cases. Eligibility decisions by ERISA trustees are entitled to considerable deference and will not be reversed absent arbitrary, capricious, or bad faith action or a result unsupported by substantial evidence or erroneous on a question of law. *Moore v. Provident Life and Accident Ins. Co.*, 786 F.2d 922, 927 (9th Cir. 1986).

We decline to debate the question whether federal or state law applies to Malick's claims for benefits and damages. His claims were properly dismissed. Malick was not entitled to relief under either federal or state law. Nor shall we take the route of remanding for dismissal for failure to exhaust administrative appeals from the committee action.

Summary judgment was proper. There were no factual questions. The committee of trustees did not act arbitrarily or capriciously. The evidence to support the conclusion was not only substantial. It was overwhelming.

AFFIRMED.

APPENDIX E

480 U.S. 935, 94 L.Ed.2d 767

IN THE SUPREME COURT OF THE UNITED STATES

No. 86-1293

ALEXANDER MALICK,
Petitioner,

v.

SANDIA CORPORATION.

Case below, 800 F.2d 263; 804 F.2d 1252.

Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

March 23, 1987. Denied.

Rehearing Denied May 4, 1987.

See 481 U.S. 1048, 107 S.Ct. 1988.

APPENDIX F

481 U.S. 1043, 95 L.Ed.2d 828

IN THE SUPREME COURT OF THE UNITED STATES

No. 86-1293

ALEXANDER MALICK,
Petitioner,

v.

SANDIA CORPORATION.

Former decision, 480 U.S. 935, 107 S.Ct. 1577.

Case below, 9 Cir., 800 F.2d 263; 804 F.2d 1252.

May 4, 1987. The petition for rehearing is denied.

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-2299

D.C. No. CV-38-4836 RHS
N.D. Cal.

ALEXANDER MALICK,
Plaintiff-Appellant,
vs.

SANDIA CORPORATION, *et al.*,
Defendant-Appellee.

ORDER

[Filed Sept. 4, 1987]

Before: WRIGHT and FARRIS, Circuit Judges.

The Appellant's Motion to Recall Mandate and to Reconsider and Set Aside Order Granting Summary Judgment, filed on August 21, 1987, has been considered together with the Appellee's Response, filed on August 27, 1987, and is DENIED.

APPENDIX H

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-89-2765-WWS

ALEXANDER W. MALICK,
Plaintiff,

vs.

SANDIA CORPORATION,
Defendant.

ORDER

[Filed Oct. 31, 1989]

Plaintiff Alexander Malick, proceeding *pro se*, brings this "Independent Action in Equity . . . Fed. Rule Civ. Proc. 60(b)" to vacate a summary judgment entered against him in an earlier action in this court, *Malick v. Sandia*, C-83-4836-RHS. This court has jurisdiction over this independent action because the judgment under attack was entered by this court. *Pacific Ry. of Missouri v. Missouri Pacific Ry. Co.*, 111 U.S. 505, 521-22 (1884); *Narramore v. United States*, 852 F.2d 485, 492 (9th Cir. 1988); *see* 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2868 n.23 (1973).

In the earlier action, Malick, who had performed engineering work for Sandia, sought an accounting and damages for fringe benefits and services to which he would have been entitled if he had been an employee of Sandia. Summary judgment was entered against Malick, the judgment was upheld by the Ninth Circuit, certiorari

and rehearing was denied by the Supreme Court, and the Ninth Circuit denied a subsequent Rule 60(b)(1) motion to recall mandate.

Sandia now brings this motion to dismiss based upon *res judicata* and other grounds.

I. Procedural Background

Malick filed his diversity action for breach of contract and fraud on October 13, 1983. The complaint alleged that Malick, who had worked for Sandia as an engineer for twelve years, should have been considered an employee during that period, not an independent contractor, and that he therefore was entitled to benefits under Sandia's employee benefits plan. The complaint sought compensatory and punitive damages. In December of 1983, Sandia's Employee Benefits Committee determined that Malick did not qualify for benefits. Judge Schnacke denied Sandia's motion for summary judgment on August 9, 1984, finding that there were triable issues of fact whether Malick was an employee or an independent contractor. Upon a fully briefed motion for reconsideration, however, Judge Schnacke reversed himself and entered summary judgment against Malick on May 3, 1985. Judge Schnacke determined that even if Malick were considered an employee, he would still not be covered by Sandia's employee benefits plan.

Malick filed a motion to alter or amend judgment, which was denied. He then appealed the judgment to the Ninth Circuit, which affirmed, and which later rejected Malick's petition for rehearing. The Supreme Court denied certiorari. On September 4, 1987 the Ninth Circuit denied Malick's motion to recall mandate and to reconsider.[1]

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[1] According to Sandia, Malick's certiorari petition and the action at bar were filed *pro se*. He was represented by counsel in the other proceedings. (Memo. at 2.)

II. Discussion

Malick contends that the Ninth Circuit "committed an extrinsic mistake which has resulted in an unconscionable affirmation of summary judgment," (Cmpl't at 11) because it based its affirmance of summary judgment on ERISA grounds, and not on the state law causes of action which Malick plead in his original complaint.[2] Malick further contends that he was improperly denied the opportunity to present argument on the issue of the proper standard of review of an ERISA trustee's determination—the issue upon which, he contends, the Ninth Circuit based its decision.

The Ninth Circuit, however, was aware of these contentions and rejected them. In its order denying Malick's petition for rehearing and rejecting his suggestion for a rehearing *en banc*, the Ninth Circuit amended its original order to read: "We decline to debate the question whether federal or state law applies to Malick's claims for benefits and damages. His claims were properly dismissed. Malick was not entitled to relief under either federal or state law. . . . Summary judgment was proper." (Amended Memorandum filed Nov. 13, 1986 at 3.)

In the face of the Ninth Circuit's explicit ruling that Malick was not entitled to relief under state law, and that summary judgment was proper, there is no basis for Malick to contend that the Ninth Circuit improperly ignored his state law claims or improperly based its decision on ERISA grounds. The Ninth Circuit has considered that contention and rejected it, and the Supreme Court has denied certiorari. This Court may not now

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[2] The Ninth Circuit looked to the decision of Sandia's Employee Benefit Committee which found Malick ineligible for benefits, reviewed that decision on an arbitrary or capricious standard, and found that the Committee's conclusion was based on "overwhelming" evidence.

re-examine that same contention.[3] Malick offers no other grounds for vacating the summary judgment, and his action is dismissed. Malick is admonished that the repetitive assertion of a previously adjudicated claim may subject him to sanctions under Rule 11.

IT IS SO ORDERED.

DATED: October 31, 1989

/s/ William W. Schwarzer
WILLIAM W. SCHWARZER
United States District Judge

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[3] "Under the law of the case doctrine 'a decision of a legal issue or issues by an appellate court . . . must be followed in all subsequent proceedings in the same case . . . unless the evidence on a subsequent trial [is] substantially different. . . .'" Gould v. Mutual Life Ins. Co. of New York, 790 F.2d 769, 774 (9th Cir.), *cert. denied*, 479 U.S. 987 (1986) (citations omitted). "[A] decision of a legal issue or issues by an appellate court establishes the 'law of the case' and must be followed in all subsequent proceedings in the same case in the trial court . . . unless . . . controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice." Moore v. Jas. H. Matthews and Co., 682 F.2d 830, 834 (9th Cir. 1982) (quoting White v. Murtha, 377 F.2d 428, 431-32 (5th Cir. 1967)). Malick has not alleged anything that would indicate that the Ninth Circuit has subsequently reversed itself on a controlling issue of law, or that its twice-repeated judgment was "clearly erroneous."

APPENDIX I

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 89-16591

D.C. No. CV-89-2765-WWS

ALEXANDER W. MALICK,
Plaintiff-Appellant,

v.

SANDIA CORPORATION,
Defendant-Appellee.

MEMORANDUM *

[Filed Sep. 24, 1990]

Appeal from the United States District Court
for the Northern District of California
William W. Schwarzer, District Judge, Presiding

Submitted September 18, 1990 **

Before: GOODWIN, Chief Judge, HUG, and BEEZER, Circuit Judges.

Alexander W. Malick appeals pro se the district court's order dismissing this action as barred on res judicata

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for disposition without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4. Accordingly, we deny Malick's request for oral argument.

grounds. Malick's action sought to set aside the court's earlier grant of summary judgment in a diversity action for breach of contract and fraud against Sandia Corp., his former employer. We have jurisdiction pursuant to 28 U.S.C. § 1291 and affirm.

I. Standard of Review

The district court's dismissal of an action on res judicata grounds is reviewed de novo. *See Lea v. Republic Airlines, Inc.*, 903 F.2d 624, 634 (9th Cir. 1990). A party's entitlement to a jury trial in a federal court is a question of law reviewed de novo. *See Standard Oil Co. of Calif. v. Arizona*, 738 F.2d 1021, 1022-23 (9th Cir. 1984), *cert. denied*, 409 U.S. 1132 (1985).

II. Merits

A. Res Judicata

Malick contends that the district court erred in finding that res judicata barred his action because exceptional circumstances created an "extrinsic mistake" in this court's decision affirming the district court's grant of summary judgment.[1]

"Federal Rule of Civil Procedure 60(b) provides that the rule 'does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding.' Fed. R. Civ. P. 60(b). Thus, 'a federal court, in an independent action, has jurisdiction to modify a final judgment in a former proceeding on the ground of mistake . . . .'" *Narramore v. United States*, 852 F.2d 485, 493 (9th Cir. 1988) (quoting *West Virginia Oil & Gas Co. v. George E. Breece Lumber Co.*, 213 F.2d 702, 706 (5th Cir. 1954). Under

[1] Malick also contends that the district court erred in applying the "law of the case" doctrine to this action because the action is separate and independent of the original suit. Because we find that the district court propertly dismissed his action on res judicata grounds, we need not address this contention.

the doctrine of res judicata, however, a final judgment bars further litigation by the same parties on the same cause of action. *See Montana v. United States*, 440 U.S. 147, 153 (1979); *American Triticale, Inc. v. Nytco Serv., Inc.*, 664 F.2d 1136, 1146-47 (9th Cir. 1982) ("[a] judgment in a previous suit is conclusive in a second suit between the same parties or their privies on the same cause of action").

Here, Malick's action alleges that this court committed an "extrinsic mistake" in affirming the district court's grant of summary judgment based on the Employee Retirement Income Security Act (ERISA), and not on the state law claims in his original complaint. This contention is without merit. In our amended memorandum affirming the district court's grant of summary judgment, we explicitly found that all of Malick's "claims were properly dismissed [and that] Malick was not entitled to relief under either federal or state law." *Malick v. Sandia Corp.*, No. 85-2299, amended unpublished memorandum at 3 (9th Cir. No. 13, 1986). Consequently, the district court's finding that our decision had reviewed and rejected Malick's state law claims was correct. Thus, the district court properly held that, absent any other grounds or evidence, it was barred from re-examining those same contentions.

B. Right to a Jury Trial

On appeal, Malick contends that the district court's grant of summary judgment pursuant to Federal Rule of Civil Procedure 56 is unconstitutional because it deprives him of his seventh amendment right to a jury trial. *See* Fed. R. Civ. P. 56. A grant of summary judgment does not violate the seventh amendment right to a jury trial. *See Sengupta v. Morrison-Knudsen Co., Inc.*, 804 F.2d 1072, 1077-78 n.3 (9th Cir. 1986); *see also Plaisance v. Phelps*, 845 F.2d 107, 108 (5th Cir. 1988) ("[t]he function of a jury is to try the material

facts; where no such facts are in dispute, there is no occasion for jury trial. Thus the right to trial by jury does not prevent a court from granting summary judgment"). Therefore, this claim is wholly without merit.

III. Appellate Sanctions

Sandia Corp. requests sanctions against Malick for bringing this appeal. This court has discretion to impose sanctions against litigants, even pro se, for bringing a frivolous appeal. Fed. R. App. P. 38; 28 U.S.C. § 1912; *Wilcox v. Commissioner*, 848 F.2d 1007, 1008-09 (9th Cir. 1988) ($1,500 sanction imposed on pro se litigant for bringing a frivolous appeal). An appeal is frivolous if the results are obvious, or the arguments of error are wholly without merit. *Id.* at 1009 (citation omitted).

Here, the district court warned Malick that his repetitive action were sanctionable. Malick, however, failed to heed the district court's warning. Malick's claims are wholly without merit; accordingly, we impose $500 damages as a sanction.

AFFIRMED.